

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-13648-MWV
Chapter 7

Ottoman's, Inc.,

Debtor

Timothy P. Smith, Chapter 7 Trustee,
Plaintiff

Adv. No. 01-1210-MWV

v.

Hall, Morse, Anderson, Miller & Spinella,
Defendant

MEMORANDUM OPINION

The parties ask the Court to determine whether, for purposes of a proceeding commenced by the Chapter 7 Trustee ("Trustee"/"Plaintiff") to avoid a post-petition transfer, the date of receipt or the date of honor rule applies to a check delivered to Hall, Morse, Anderson, Miller & Spinella ("Defendant") prior to Ottoman's, Inc.'s ("Debtor's") bankruptcy, but honored post-petition. The parties have submitted supporting memoranda of law and stipulated to the facts of the case.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The facts are not disputed. The above captioned case was filed under Chapter 11 on November 22, 1999 and converted to Chapter 7 on January 26, 2001. On November 22, 1999, several hours before its bankruptcy filing, the Debtor issued Check number 5003 for \$4,796.47 (the “Check”) to the Defendant in satisfaction of obligations owed by the Debtor to the Defendant for legal services. Although the Debtor delivered the Check pre-petition, it was not honored until November 29, 1999, one week after the filing.

On November 19, 2001, the Trustee filed his complaint, which set forth two claims for relief: recovery of the payment as a preferential transfer pursuant to 11 U.S.C. § 547 (“Count I”), or, in the alternative, avoidance of the payment as a post-petition transfer of property of the estate pursuant to § 549 (“Count II”).¹ However, in his supporting memorandum, the Trustee focuses on the § 549 allegation. The Defendant contends that the date of delivery of the check should govern, not the date that the check was honored, rendering the transaction a pre-petition transfer subject to the § 547(c) exception.

DISCUSSION

The issue before this Court is whether, pursuant to § 549, a check delivered pre-petition, but honored post-petition, is governed by the date of receipt or the date of honor rule. Section 549(a) permits a trustee to avoid a transfer of property of the estate that occurs after the commencement of the case and is not authorized by the Bankruptcy Code or by the Court. See 11 U.S.C. § 549. Although the First Circuit has not specifically addressed the issue, several other courts have determined that the pertinent date for transfer of a check for purposes of § 549 is the date the check was honored. See 5 Collier on Bankruptcy ¶ 549.04[2] (Lawrence P. King ed., 15th ed. rev. 2001); see also Guinn v. Oakwood Properties, Inc. (In re Oakwood Markets, Inc.), 203 F.3d 406, 409 (6th Cir. 2000); Wittman v. State Farm Life Ins. Co., Inc. (In re Mills), 176 B.R. 924, 927 (D. Kan. 1994); Spear v. CEMA Distrib. (In re Rainbow Music, Inc.),

¹ Unless otherwise noted, all section references herein are to Title 11 of the United States Code.

154 B.R. 559, 562 (Bankr. N.D. Cal. 1993).

In addition, the Supreme Court has held that under § 547(b), the transfer of an ordinary check does not take place until the check is honored. See Barnhill v. Johnson, 503 U.S. 393, 394-95, 112 S.Ct. 1386 (1992). In reaching its decision, the Court noted that the receipt of a check does not give the recipient any rights in the funds held by the bank because “[m]yriad events can intervene between delivery and presentment of the check that would result in the check being dishonored.” Id. at 399. Thus, a “‘transfer’ as defined by § 101(54) occurs on the date of honor, and not before.” Id. at 400.

Under § 547(c), the date of the delivery is the applicable date. See Barnhill, 503 U.S. at 402 n.9 (noting, in dicta, that “[t]hose Courts of Appeals to have considered the issue are unanimous in concluding that a ‘date of delivery’ rule should apply to check payments for purposes of § 547(c)” (citations omitted)); O’Neill v. Nestle Libbys P. R., Inc., 729 F.2d 35, 38 (1st Cir. 1984). Before the exception under § 547 applies, however, the transfer must be deemed to be pre-petition. In the context of the present case, the transfer occurred when the check was honored post-petition pursuant to § 549. The Defendant appears to rely solely on the dicta in Barnhill to support its position that because the check was received pre-petition, § 549 is inapplicable. However, as the Supreme Court indicated, the § 547(c) exception to the date of honor rule only reflects Congress’ intent to allow parties to continue to deal with Debtors on normal business terms. See Barnhill, 503 U.S. at 402. Although the Defendant contends that the date of delivery rule is applicable in the present case, the Defendant does not set forth any evidence as to why § 549 and the date of honor rule is inapplicable. Instead, the Defendant’s assertion would create a safe harbor, unintended by Congress, for checks delivered before the commencement of a bankruptcy case and honored after the petition date because the payment would not be recoverable as a preference or a post-petition transfer. See In re Rainbow Music, Inc., 154 B.R. at 561-62.

CONCLUSION

The Court concludes that the Check transfer in this case occurred post-petition for purposes of §

549. Accordingly, the Court grants Count II of the Trustee's complaint to avoid a post-petition transfer. Count I of the complaint is moot. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 26th day of March, 2002, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge